(1)S.B.Criminal Revision Petition No.1074/2007
(Hanuman Ram v. State of Rajasthan & Ors.)

(2)S.B.Criminal Revision Petition No.999/2007
(Hanuman Ram v. State of Rajasthan & Ors.)

Date of Order :: 16th November, 2007

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. Vishal Sharma, for the petitioner.
Mr. Vishnu Kachhawaha, Public Prosecutor.
Mr. S.S.Jodha, for the respondents.

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By an order dated 6.8.2007 and 22.8.2007, Additional Sessions Judge (Fast Track), Parbatsar rejected applications preferred by the petitioner under Section 311 and Section 91 Cr.P.C., hence these petitions under Section 397 read with 401 Cr.P.C. are preferred.

The factual matrix necessary to be noticed is that at the instance of the petitioner a criminal case contemplating offences under Sections 323, 341, 307/34 IPC was registered at police station Makrana with the allegation that on 11.12.2006 Devaram, Omaram and Sewaram gave a hit by jeep to the motorcycle on which complainant Bhuraram, Hanumanram and Ratnaram were riding and on falling down they were assaulted by the accused persons. As a consequent to death of Ratnaram the investigating agency after due investigation submitted challan before the competent magistrate for the offences under Sections 302, 307,

323 and 341/34 IPC. The case was committed to the trial court, charges were framed and the statements of the prosecution witnesses were recorded.

Statements of one Dr.B.S.Dutta PW-20 were recorded on 21.7.2007 wherein he stated that Ratnaram was under his treatment as an indoor patient in Neuro Surgical Department of Jawahar Lal Nehru (JLN) Hospital, Ajmer from 12.12.2006 to 22.12.2006. One another prosecution witness Dr.M.D.Qureshi PW-15 in his statements stated that Ratnaram was admitted to S.K.Hospital, Jaipur on 25.12.2006 and prior to that he was undergoing treatment at JLN Hospital, Ajmer. It is also pertinent to note that on 23.12.2006 MRI Scan of Ratnaram was done at Pratap Memorial Hospital and Research Centre, Ajmer by one Dr.Anju Yadav on reference made by JLN Hospital, Ajmer. MRI Lumbo Sacral Spine of injured Megharam was also conducted by Dr.Anju Yadav on 12.12.2006 on being referred by Dr. B.S.Dutta PW-20.

The petitioner claimed to recall and re-examine Dr. B.S.Dutta being essential to the just decision of the case as in his earlier statements he did not mention about treatment said to be given by him to Ratnaram at JLN Hospital, Ajmer upto 25.12.2006. Application under Section 311 Cr.P.C. was also pressed to call and examine Dr.Anju Yadav as she conducted MRI of Ratnaram on 23.12.2006 on being

referred by JLN Hospital, Ajmer and also conducted MRI of injured Megharam under reference made by Dr.B.S.Dutta.

The contention of counsel for the petitioner is that recalling and re-examining of Dr.B.S.Dutta and Dr.Anju Yadav is essential to the just decision of the case for completing link of circumstances.

On the other hand, stand of the respondents is that the petitioner only with a view to delay proceedings of the case want to call and examine Dr.B.S.Dutta and Dr.Anju Yadav. According to the respondents learned trial court by orders impugned rightly held that Dr.B.S.Dutta has given sufficient evidence about date of discharge of Ratnaram from JLN Hospital, Ajmer and, therefore, his further examination is not at all warranted. Counsel for the respondents also supported finding given by learned trial court that there was no need to call and examine Dr.Anju Yadav as whatever she can state has already been verified by Dr.M.D.Qureshi who conducted postmortem.

Heard and also examined the record made available by counsel for the parties.

The scope of provisions of Section 311 Cr.P.C. is well defined. Hon'ble Supreme Court in the

case of Mohanlal Shamji Soni v. Union of India and another, AIR 1991 SC 1346, while examining scope of provisions of Section 311 Cr.P.C. held as under:-

> "6.Before adverting to the arguments advanced on behalf of the appellant, we would examine in general the scope and intent of Section 540 of the old Code (corresponding to Section 311 of the new Code).
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> 7.Section 540 was found in Chapter XLVI of the old Code of 1898 under the heading 'Miscellaneous'. But the present corresponding Section 311 of the new Code is found among other Sections in Chapter XXIV under the heading 'General Provisions as to Enquiries and Trials'. Section 311 is an almost verbatim reproduction of Section 540 of the old Code except for the insertion of the words 'to be' before the word 'essential' occurring in the old Section. This section is manifestly in two parts. Whereas the word used 'in the first part is 'may' the word used in the second part is 'shall'. In consequence, the first part which is permissive gives purely discretionary authority to the Criminal Code and enables it at 'any stage of enquiry, trial or other proceedings' under the Code to act in one of the three ways, namely,
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> (1)to summon any person as a witness, or
> (2)to examine 'any person in attendance, though not summoned as a witness, or
> (3)to recall and re-examine any person, already examined.

8.The second part which is mandatory imposes an obligation on the Court-

(1)to summon and examine, or
(2)to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

9.The very usage of the words such as, any Court', 'at any stage', or 'of any enquiry, trial or other proceedings', 'any' person' and any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the Court in any way. Rowever, the very width requires a corresponding caution that the discretionary power should be invoked as he exig encies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the Section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.

10.It is cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution

or the defence' to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the Court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is well accepted and settled principle that a Court must discharge its statutory "functions whether discretionary or obligatory – according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall

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> or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected' to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.
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> 11.There are various other provisions in the nezy Code corresponding to the provis, ons of the old Code empowering the Court,, ecifled therein to recall any witness or witnesses already examined or summon any witness, if it is felt necessary in the interest of justice at various stages mentioned in the concerned specific provisions."

In the instant matter the Court is required to examine as to whether recalling and re-examining of Dr.B.S.Dutta and calling and examination of Dr.Anju Yadav is essential to just decision of the case. The Court is required to see that what could be the best evidence available that can be brought before the Court to prove the facts or the point in issue. Applying the principles laid down by Hon'ble Supreme Court in the case of Mohanlal Shamji Soni (supra), I found that recalling and re-examination of Dr.B.S.Dutta as well as calling and examination of Dr.Anju Yadav is essential to the just decision of the case. Dr.B.S.Dutta though stated that Ratnaram was treated by him at JLN Hospital, Ajmer as an indoor

patient from 12.12.2006 to 22.12.2006 but Ratnaram was admitted at S.K.Hospital, Jaipur on 25.12.2006. MRI of Ratnaram was made at Pratap Memorial Hospital on being referred by JLN Hospital on 23.12.2006, thus, the gap from 22.12.2006 to 25.12.2006 requires verification and for that purpose recalling and re-examination of Dr.B.S.Dutta is quite just. Similarly, Dr.Anju Yadav who conducted MRI of deceased Ratnaram as well as of injured Megharam is required to be called for in witness box. Learned trial court refused for calling of Dr.Anju Yadav on the count that Dr.M.D.Qureshi PW-15 conducted the postmortem and he has stated all those facts that could have been stated by Dr.Anju Yadav. I feel that the learned trial court failed to appreciate that Dr.Anju Yadav is required to call for to complete the link of circumstances regarding treatment of deceased Ratnaram from 12.12.2006 to 25.12.2006 as she is said to have undertaken MRI of Ratnaram on 23.12.2006. She is also required to be called for and examined as a witness as she conducted MRI of Megharam on 12.12.2006.

For the reasons mentioned above, these revision petitions deserve acceptance and, therefore, the same are allowed. The orders impugned dated 6.8.2007 and 22.8.2007 passed by Additional Sessions Judge (Fast Track), Parbatsar are quashed. The applications preferred by the petitioner under Section 311 and Section 91 Cr.P.C. are allowed. Dr.B.S.Dutta

and Dr.Anju Yadav are ordered to be summoned as witnesses in Sessions Case No.16/2007 (2/07) pending before the court of Additional Sessions Judge (Fast Track), Parbatsar Camp Makrana.

No order to costs.

(GOVIND MATHUR),J.

Kkm/ps.